FILE COPY

FEB 2 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 558

■

MRS. ELLA JAMISON, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

■

APPEAL FROM THE COUNTY CRIMINAL COURT OF DALLAS COUNTY, TEXAS

APPELLANT'S BRIEF

HAYDEN C. COVINGTON
Attorney for Appellant

INDEX

PAGE

SUBJECT INDEX

Opinions Below 1

Jurisdiction 1

County Criminal Court is Highest Court in which Decision can be Had 1

Timeliness 2

The Statute 2

Statement 3
- Facts 3
  - "Front Side" of LEAFLET 4
  - "Back Side" LEAFLET 5

History of Proceedings and Federal Questions Raised Below 6-8
- Corporation Court Proceedings 6
- County Criminal Court Proceedings 6

Specification of Errors to Be Urged 8

Points for Argument 9-10

Summary of Argument 10

ARGUMENT 13-48

ONE—This court should hold that the ordinance in question as construed and applied abridges and prohibits exercise of appellant's fundamental personal right of freedom to worship ALMIGHTY GOD, Jehovah, contrary to the First and Fourteenth Amendments to the United States Constitution 13

Summary of Lecture ["PEACE—Can It Last?"] 15-17

PAGE

TWO—This court should hold that the ordinance by its terms and as construed and applied expressly abridges and prohibits exercise by appellant of her fundamental personal rights of freedom of assembly, of speech, and of the press, contrary to the First and Fourteenth Amendments to the United States Constitution 26

THREE—This court should hold that the ordinance is void on its face because it provides for unreasonable and arbitrary means which have no reasonable relation to the ends aimed for nor to the police powers of the state, contrary to the Fourteenth Amendment to the United States Constitution 32

FOUR—This court should hold that under Section 237 (a) of the Judicial Code [28 U.S.C. 344 (a)] the appeal provided for therein from a final judgment of the highest court of Texas in which a decision can be had cannot be refused review by this cour until application for writ of habeas corpus is presented and refused by some higher court of Texas 33

FIVE—This court should hold that under the law and practice of Texas there was not and is not an opportunity for further full review of the judgment in a higher court of Texas by way of writ of habeas corpus or other proceedings 39

Conclusion 48

PAGE

Agnello v. United States
269 U. S. 20 38
Baker, Ex parte
127 Tex. Cr. R. 589, 78 S. W. 2d 610, 613 43
Barnette v. West Virginia State Board, etc.
47 F. Supp. 251 18
Battis, Ex parte
40 Tex. Cr. R. 112, 48 S. W. 513 41
Betts v. Brady
316 U. S. 455, 460-461 38
Burns (Jay) Baking Co. v. Bryan
264 U. S. 504 33
Butcher, Ex parte
122 Tex. Cr. R. 39, 53 S. W. 2d 781 42
Calhoun, Ex parte
91 S. W. 2d 1047 40
Cantwell v. Connecticut
310 U. S. 296 ..... 10, 13, 18, 26
Carlson v. California
310 U. S. 106 ..... 11, 28
Carpenter v. Longan
16 Wall. 271, 21 L. Ed. 313 47
Cohens v. Virginia
6 Wheat. 264, 404 ..... 35, 38
Collins v. Texas
223 U. S. 288 40
Commonwealth v. Reid
144 Pa. S. C. 569, 20 A. 2d 841 25
Concordia Fire Ins. Co. v. Illinois
292 U. S. 535, 545 10
Conley v. State
141 Tex. Cr. R. 478, 149 S. W. 2d 99 34
Davis v. Commonwealth
167 U. S. 44 21

PAGE

Degener, Ex parte
17 S. W. 1111, 1114 44
Dobbins v. Los Angeles
195 U. S. 223 ..... 12, 32
Downham v. Alexandria
9 Wall. 659 35
Dreibelbis, Ex parte
133 Tex. Cr. R. 83, 109 S. W. 2d 476 44
Edwards v. California
314 U. S. 160, 171, 172 ..... 2, 37
Ernest, Ex parte
138 Tex. Cr. R. 441, 136 S. W. 2d 595 43
Eubank v. Richmond
226 U. S. 137 32
Farnsworth, Ex parte
61 Tex. Cr. R. 342, 135 S. W. 535 41
Faulkner, Ex parte
158 S. W. 2d 525 41
Garza, Ex parte
28 Tex. Cr. R. 381 42
Gregory v. McVeigh
23 Wall. 294, 306 34
Grosjean v. American Press Co.
297 U. S. 233 ..... 26, 31
Grovey v. Townsend
295 U. S. 45 ..... 2, 35
Hague v. C. I. O.
307 U. S. 496, 501, 518 ..... 11, 21, 26
Hamilton v. Regents
293 U. S. 245, 257-258 47
Harlan v. State
138 Tex. Cr. R. 47, 134 S. W. 2d 289 34
Heike v. United States
217 U. S. 423-429 47

PAGE

Herndon v. Georgia
295 U. S. 441 40
Herndon v. Lowry
301 U. S. 242 ..... 31, 40
Hodge v. State
137 Tex. Cr. 195-196, 128 S. W. 2d 1205 34
Jacobson v. Massachusetts
197 U. S. 11, 25 32
Jarvis, Ex parte
3 S. W. 2d 84 42
Jay Burns Baking Co. v. Bryan
264 U. S. 504 33
Jones, Ex parte
81 S. W. 2d 706 42
Jones v. Opelika
316 U. S. 584 ..... 11, 14, 18, 25, 26, 29, 30
Jonischkiss, Ex parte
88 Tex. Cr. R. 574, 227 S. W. 952 42
Kearby, Ex parte
34 S. W. 635; 34 S. W. 962 44
Kennedy, Ex parte
78 S. W. 2d 627 43
Kent, Ex parte
49 Tex. Cr. R. 12, 90 S. W. 168 ..... 40, 41
Kentucky v. Powers
201 U. S. 1, 37-39 ..... 2, 37, 46
Kim Young v. People of California
308 U. S. 147 37
King Mfg. Co. v. City Council of Augusta
277 U. S. 100, 102-114 47
Largent, Ex parte
162 S. W. 2d 419 ..... 12, 39, 41, 42, 44, 45, 46
Lawton v. Steele
152 U. S. 133, 137 33

PAGE

Lewis, Ex parte
45 Tex. Cr. R. 1, 73 S. W. 811 43
Lovell v. Griffin
303 U. S. 444 ..... 26, 28, 30, 47
Mihlfread, Ex parte
128 Tex. Cr. 556, 83 S. W. 2d 347 43
Mooney v. Holohan
294 U. S. 103, 115 ..... 35, 36, 37
Mugler v. Kansas
123 U. S. 623 33
Near v. Minnesota
283 U. S. 697, 707-716 ..... 11, 26, 28
Neill, Ex parte
32 Tex. Cr. R. 275, 22 S. W. 923 41-42
Northw'n Bell Tel. v. Nebr. St. Ry. Com'n
297 U. S. 417, 473 45
Panhandle E. Pipe Line Co. v. State H'way Com'n
294 U. S. 613, 622 ..... 12, 32
Patterson, Ex parte
42 Tex. Cr. R. 256, 58 S. W. 1011 41
Perkins, Matter of
2 Cal. 424 37
Philadelphia & Reading Coal & Iron Co. v. Gilbert
245 U. S. 162, 165 33
Phillips v State
138 Tex. Cr. R. 9, 133 S. W. 2d 580 34
Purity Extract Co. v. Lynch
226 U. S. 192, 204 12
Ragsdale v. State
120 Tex. Cr. R. 63, 47 S. W. 2d 278 ..... 2, 34
Reynolds v. United States
98 U. S. 145, 162 18
Rogers, Ex parte
83 Tex. Cr. R. 152, 201 S. W. 1157 ..... 40, 41

PAGE

Roquemore, Ex parte
60 Tex. Cr. R. 282, 131 S. W. 1101 42
Schneider v. State
308 U. S. 147, 154 ..... 2, 11, 26, 27, 31
Slawson, Ex parte
139 Tex. Cr. R. 607, 141 S. W. 2d 609 ..... 41, 44
Smith v. Texas
233 U. S. 630 32
Spann v. State
161 S. W. 2d 494 34
Spelce, Ex parte
119 S. W. 2d 1037 41
State v. Girault
11 How. 22, 32 47
State v. Smith
155 Kans. 588, 127 P. 2d 518 18
Stein, Ex parte
61 Tex. Cr. R. 320, 135 S. W. 136 43
Tenner v. Dullea
314 U. S. 585, 692 ..... 35, 36, 37
Thornhill v. Alabama
310 U. S. 88 ..... 11, 28
Tinsley v. Anderson
171 U. S. 101 40
United States v. Carolene Prod. Co.
304 U. S. 144, 152-153 32
Valentine v. Chrestensen
316 U. S. 52 ..... 11, 14, 17, 28-32
Wall, Ex parte
91 S. W. 2d 1065 42
Weaver v. Palmer Bros. Co.
270 U. S. 402 ..... 12, 32
Young (Kim) v. People of California
308 U. S. 147 37

Cases Cited

PAGE

Zaney, Matter of
164 Cal. 724, 727 37
Zimmermann v. London
38 F. Supp. 582 28

Statutes Cited

California Constitution, Art. VI, ss. 1, 4, 4b, 5 37

California Penal Code, s. 1475 37

Congress, Act of
January 31, 1928 (Ch. 14, 45 Stat. 54) 1
April 26, 1928 (Ch. 440, 45 Stat. 466) 1

Dallas (Tex.) city ordinance No. 3251, Art. 140-7 .... 2, 6

Texas Code of Criminal Procedure, Art. 53 .. 1, 34, 40, 41

Texas Statutes (Vernon's Centennial Ed.), Declaration of Independence of Texas 17

Texas Unlawful Medical Practice Act 40

United States Code, Title 28
Sec. 344 (a) [Judicial Code, s. 237 (a)]
1, 12, 33, 34, 40, 46, 47
Sec. 344 n. 32 37

United States Constitution
Amendment I 7, 8, 11, 13, 26, 31, 32, 37
Amendment XIV 7, 8, 11, 13, 26, 31, 32, 37

Virginia Statute for Religious Freedom
(Virginia Code, s. 34) 18

Miscellaneous Citations

PAGE

ALMIGHTY GOD, Word of [the Bible]:

Psalm 19: 7, 8 20
Psalm 36: 9 20
Psalm 40: 8 19
Psalm 145: 20 20
Proverbs 1: 20, 21 19
Isaiah 6: 1-11 19
Isaiah 43: 10-12 19
Isaiah 44: 8 19
Isaiah 46: 11 20
Jeremiah 49: 14 20
Ezekiel 3: 18 5
Ezekiel 16: 28-43 16
Ezekiel 23: 17-31 16
Ezekiel 33: 8, 9 5
Daniel 2: 44 16
Obadiah 1 20
Micah 4: 3, 4 17
Malachi 3: 6 20
Matthew 24: 14 19
Mark 6: 6 19
Mark 16: 15 19
Luke 8: 1 19
Luke 13: 26 19
John 17: 3 20
John 18: 37 19
Acts 4: 19 6
Acts 5: 29 ..... 6, 20
Acts 5: 42 19
Acts 20: 20 19
Romans 1: 31, 32 20
2 Corinthians 5: 20 20
Ephesians 6: 20 20
1 Peter 2: 9, 21 19
Revelation 17 ..... 14, 15

Miscellaneous Citations

	PAGE
Blackstone, *Commentaries,* Chase 3d ed., pp. 5-7	19
Britannica, Encyclopædia, Vol. 20, "Pamphlets," pp. 659-660	25
Columbia Encyclopedia	25
Cooley, *Constitutional Limitations,* 8th ed., p. 968	19
Freund, *The Police Power,* pp. 133, 497	12, 32
Hitler, Adolph, *Mein Kampf,* "The State," Ch. XIV ..	24
Jefferson, Thomas, Virginia Statute for Religious Freedom	18
McQuillen on Municipal Corporations (2d ed.), Vol. 3, p. 122	33
Texas Declaration of Independence (Vernon's Texas Statutes, Centennial Ed.)	17

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 558

■

MRS. ELLA JAMISON, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

■

APPEAL FROM THE COUNTY CRIMINAL COURT OF DALLAS COUNTY, TEXAS

APPELLANT'S BRIEF

Opinions Below

The court below did not render, write or file an opinion.

Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code [28 U.S.C. 344 (a)].

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error.

County Criminal Court is Highest Court in which Decision can be Had

Article 53 of the Code of Criminal Procedure for Texas provides that the Court of Criminal Appeals of Texas does not have jurisdiction of an appeal from a judgment rendered by the County Court on *trial de novo*

on appeal from a Corporation or Justice Court where the fine assessed does not exceed the sum of $100. *Ragsdale* v. *State,* 120 Tex. Cr. R. 63, 47 S. W. 2d 278.

Therefore the court below is the highest court of the State of Texas in which a decision can be had in this cause. This makes possible a direct appeal to this court. *Schneider* v. *State,* 308 U. S. 147, 154; *Edwards* v. *California,* 314 U. S. 160, 171-172; *Kentucky* v. *Powers,* 201 U. S. 1, 37-39; *Grovey* v. *Townsend,* 295 U. S. 45.

The question of whether or not the judgment here appealed from is subject to further review in a higher court of Texas by petition for writ of habeas corpus is discussed under argument at pages 33-48, infra.

Timeliness

The judgment of the state court of last resort was rendered and entered of record on November 4, 1942. (R. 7) The judgment of the Dallas County Criminal Court is a final judgment. The petition for appeal was duly presented, filed and allowed within three months from the date of such final judgment.

The Statute

The legislation, constitutionality and validity of which as construed and applied to appellant is here drawn in question, is an ordinance of the City of Dallas, Texas, known as Article 140-7 of Ordinance No. 3251 reading as follows:

"It shall be unlawful for any person to carry or hold by hand or otherwise, any billboard, show card, placard or advertisement or sign of any description for the purpose of advertising, or to wear any costume for the purpose of attracting attention of the public, or to scatter or throw any handbills, circulars, cards, newspapers or any advertising device of any description, along or upon any street or sidewalk in the city of Dallas. Any person violating any of the provisions of this article shall be deemed guilty

of a misdemeanor, and upon conviction, may be fined in any sum not exceeding one hundred dollars."

The foregoing ordinance appears in the agreed statement of facts. R. 13-14.

Statement

The facts in this case are simple and undisputed. The evidence is in form of a stipulation of the parties. R. 8-33.

FACTS

Appellant, Mrs. Ella Jamison, is an ordained minister of Jehovah God in a covenant with Him to preach the gospel of God's kingdom, The Theocracy, by following in the footsteps of Christ Jesus, the faithful and true witness. She is associated with Oak Cliff Dallas company of Jehovah's witnesses in the performance of her ministerial activities. R. 9, 10, 11, 13-14.

While discharging her duties as an ordained minister by means of peacefully, orderly, and quietly distributing handbills and leaflets advertising a public sermon or discourse on the Bible prophecies concerning a topic of present-day interest, to wit, "Peace—Can It Last?" to be delivered by N. H. Knorr, president of the Watchtower Society on September 20, 1942, she was arrested and charged with a violation of the aforesaid ordinance by reason of handing such printed invitation to pedestrians whom she met while walking down the sidewalk along South Montclair Street in the City of Dallas, Texas. The complaint is in the record. R. 1.

Prior to September 20, 1942 the Dallas company of Jehovah's witnesses arranged to join a nation-wide assembly of Jehovah's witnesses to be held in more than 52 cities of the United States. Vickery Park was to be tied in with the "key city" Cleveland, Ohio, by telephone wire communication to carry the discourse advertised. The holding of this public meeting in Dallas was one of

the means employed by appellant and other of Jehovah's witnesses in preaching the gospel. The public in Dallas were invited to attend and listen. There were no charges for admission and no collection of any kind was solicited from those attending; but it was free of charge. The speech "Peace—Can It Last?" was also printed in booklet form and distributed free of charge to all who attended the assembly. This sermon related to a discussion of post-war conditions from the viewpoint of Bible prophecy on the subject. It shows that there are certain dangers in the coming peace conference which must be avoided in order to win the peace. If these dangers are not discovered by the people they cannot be avoided, the discourse points out. The discourse pointed out definitely the dangers to be avoided in order to win the peace. Also there was pointed out the explanation of Revelation 17:8 concerning the "beast that was, and is not, and yet is" and also clearly showed who will establish the enduring peace. The printed report of the speech "Peace—Can It Last?" was introduced in evidence and made a part of the record and identified as *Exhibit* 4. (R. 13, 14, 15-33) Examination of the contents of the exhibit shows that it was not on a commercial or selfish subject and that the convention assembly the public was invited to attend by appellant was not for a commercial or profit purpose.

The LEAFLET inviting the public to attend which was distributed by the appellant reads as follows:

[FRONT SIDE]

"Will Postwar Conditions Bring a New World? It is vital to know *now*. Hear PEACE—Can It Last? By N. H. KNORR, addressing the Nation-wide Assembly of Jehovah's witnesses simultaneously in more than 50 cities. Key Assembly, Cleveland, Ohio. SUNDAY, SEPTEMBER 20, 3 p.m., Vickery Park, Highway 75, Greenville Avenue, Dallas, Texas. All forward-looking persons of good-will are invited. *Admission Free. No Collection.*

[BACK SIDE]

THIS IS YOUR INVITATION to attend the Nation-wide Assembly of Jehovah's witnesses, particularly the public address, PEACE—Can It Last? By N. H. KNORR, President of the Watch Tower Society as announced overleaf. Also you will receive the uplifting hope of life in eternal youth in a new world, by reading CHILDREN, 384 pages, illustrated with unusual colored pictures, and bound in sky-blue cloth, stamped with gold and embossed; and HOPE, 64 pages, showing the hope for the dead and for the survivors in a righteous world. Both WATCHTOWER publications mailed to you postage prepaid on your contribution of 25c. Send to WATCHTOWER, 117 Adams St., Brooklyn, N. Y."

This LEAFLET is identified as *Exhibit* No. 1. R. 8, 9.

The undisputed evidence shows that the book and booklet described on the leaflet were not distributed by appellant because no one inquired; but that if one inquired of appellant she would have offered to deliver them to his home on the contribution of 25c which was less than actual cost of publication and distribution. (R. 12-13) The book and booklet relate to an explanation of God's kingdom and not to any commercial pursuit or purpose. The BOOK and BOOKLET are *exhibits* Nos. 3 and 3a. R. 12.

Appellant distributed the above described leaflet on the sidewalk in a quiet and orderly manner without being offensive tooanyone. She did not scatter or throw any of the leaflets upon the sidewalk as she proceeded along the street; but she handed them only to pedestrians whom she met who were willing to receive them. (R. 9-10) The appellant thus acted as a minister, believing this to be her duty to preach and that if she failed thus to preach the Gospel in this manner she would be everlastingly destroyed, as recorded in Ezekiel 3: 18, and Ezekiel 33: 8, 9. When first approached by the police officer he requested her to discontinue; but she refused and stated that she

stood in the same position with regard to the request as did the apostles of Jesus when requested to discontinue preaching, who said: "We ought to obey God rather than men." (Acts 5:29) "Whether it be right in the sight of God to hearken unto you more than unto God, judge ye." (Acts 4:19) When she thus refused to discontinue the police officer arrested her. R. 14.

History of Proceedings and Federal Questions Raised Below

CORPORATION COURT PROCEEDINGS

Appellant was charged by complaint filed in the Corporation Court of Dallas, Texas, with an alleged violation of the ordinance. (R. 1, 8) Among other things the complaint alleges: "carry, hold by hand, distribute, scatter and throw handbills as an advertising medium, in violation of and contrary to Art. 140-7 of Ord. 3251 of the Ordinances of the City of Dallas, Texas, upon the sidewalks of South Montclair Street." (R. 1, 8) Upon trial in the Corporation Court appellant urged a motion to quash on the grounds that the ordinance was unconstitutional. (R. 1, 2) The appellant was found guilty as charged in the Corporation Court and duly appealed by filing a bond. R. 36.

COUNTY CRIMINAL COURT PROCEEDINGS

The trial in the County Criminal Court was *de novo* and evidence was in the form of an agreed statement of facts. (R. 8-14.) In the time and manner required by law appellant duly filed her motion to quash the complaint in which appellant attacked the ordinance because it was in excess of the police power of the state and that the means employed were unreasonable; because by its terms and as construed and applied it abridged the people's inherent rights of freedom of assembly, the use of the streets and sidewalks, freedom of speech and of the press

and freedom of communication, contrary to the first and fourteenth amendments to the United States Constitution. (R. 3-4) The timely motion was overruled. R. 4-5.

At the close of all the evidence appellant duly filed and urged her motion for a judgment of acquittal and for an order discharging appellant because (1) the ordinance was unreasonable and in excess of the police powers of the state and denied liberty and property in violation of the Fourteenth Amendment to the United States Constitution; (2) the ordinance was void on its face because it abridges the rights of freedoms of assembly, speech, press and of the use of the public sidewalks contrary to the First and Fourteenth Amendments to the United States Constitution; and (3) the ordinance was void as construed and applied to the circumstances of appellant's activity because it abridges her rights of freedoms of assembly, speech, press, the lawful use of the public sidewalks and her right of freedom to worship Almighty God according to the dictates of her conscience contrary to the First and Fourteenth Amendments to the United States Constitution. (R. 5-6) The motion was overruled and appellant excepted. (R. 6-7) A final judgment convicting the appellant was rendered and entered and thereby appellant was fined $5 and costs. (R. 7) A motion for new trial was timely filed and amended by leave of court in which motion the ordinance was attacked on the same grounds as above. (R. 33-34) The motion for new trial was overruled and appellant excepted. R. 34-35.

The County Criminal Court, as well as the Corporation Court, duly passed upon each of said federal questions or assignments attacking the validity of the ordinance and said court held it valid and constitutional, both on its face and as applied; and held that the First and Fourteenth Amendments had not been violated in applying the ordinance to the appellant's activities. R. 1-3, 3-7, 33-35.

In the petition for appeal and the assignments of error duly filed, appellant complains of the judgment of the

County Criminal Court of Dallas County, Texas, for and on account of each of the grounds set forth in her motions to quash and for judgment of acquittal filed in said court. R. 35-38.

Specification of Errors to Be Urged

The County Criminal Court of Dallas County, Texas, committed reversible error in overruling the aforesaid motions and in rendering judgment because the court should have held that—

(1) The ordinance in question, both on its face and as construed and applied to appellant, is violative of the Federal Constitution in that it abridges appellant's freedoms of assembly and use of the public streets and sidewalks, of speech, of press and of worship of Almighty God according to the dictates of her conscience and as commanded by Jehovah God, all contrary to the First and Fourteenth Amendments to the United States Constitution.

(2) The ordinance in question is void on its face and as construed because by its terms it is in excess of the police power of the State of Texas and the City of Dallas and is unreasonable and arbitrary in the means employed which have no reasonable relation to the ends aimed for nor to the police powers of the state, and by reason thereof it violates the *due process* and *equal protection* clauses of the Fourteenth Amendment to the United States Constitution.

Points for Argument

ONE

This court should hold that the ordinance in question as construed and applied abridges and prohibits exercise of appellant's fundamental personal right of freedom to worship Almighty God Jehovah, contrary to the First and Fourteenth Amendments to the United States Constitution.

TWO

This court should hold that the ordinance by its terms and as construed and applied expressly abridges and prohibits exercise by appellant of her fundamental personal rights of freedom of assembly, of speech, and of the press, contrary to the First and Fourteenth Amendments to the United States Constitution.

THREE

This court should hold that the ordinance is void on its face because it provides for unreasonable and arbitrary means which have no reasonable relation to the ends aimed for nor to the police powers of the state, contrary to the Fourteenth Amendment to the United States Constitution.

FOUR

This court should hold that under Section 237 (a) of the Judicial Code [28 U.S.C. 344 (a)] the appeal provided for therein from a final judgment of the highest court of Texas in which a decision can be had cannot be refused review by this court until application for writ of habeas corpus is presented and refused by some higher court of Texas.

FIVE

This court should hold that under the law and practice of Texas there was not and is not an opportunity for further full review of the judgment in a higher court of Texas by way of writ of habeas corpus or other proceedings.

Summary of Argument

The stipulation is that appellant is a minister of the gospel of Jehovah God and that the distribution of the folder to those who would receive it as she walked along South Montclair Street sidewalks was a necessary part of her preaching of the gospel. She was inviting the public to attend the public meeting to hear free of charge the Bible discourse on the subject "Peace—Can It Last?" The exercise of this preaching right by her is secured against abridgment by the First and Fourteenth Amendments. *Cantwell* v. *Connecticut*, 310 U.S. 296. There is no showing or claim that the activity or the sermon advertised by her was a violation of the law of morals or endangered the peace and safety of the nation. It is stipulated that she did not throw or scatter the printed invitations upon the streets or sidewalks but that she handed them to pedestrians whom she met. There is no showing or claim that any pedestrian threw such folders upon the streets; but if they did appellant would not be responsible therefor. The ordinance has been applied to facts which make it *unconstitutional* to the extent that it has been construed to cover worshiping or preaching activity of appellant. *Cantwell* v. *Connecticut*, supra; *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535, 545.

The ordinance is unconstitutional because as construed it abridges and prohibits exercise of the fundamental personal rights of freedoms of assembly, speech and press. The holding of the court below sustaining the application

of the ordinance conflicts directly with *Schneider* v. *State*, 308 U.S. 147; *Hague* v. *C.I.O.*, 307 U.S. 496; *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; and *Near* v. *Minnesota*, 283 U.S. 697, 707-716. The ordinance is *prohibitory* in its terms and does not appear to be regulatory. There is no way that one can exercise such fundamental rights on the streets of Dallas without violating the ordinance.

The doctrine of *Valentine* v. *Chrestensen*, 316 U. S. 52, does not apply to printed information and opinion offered nor can it be relied upon because the book incidentally mentioned and advertised on the written invitation did not relate to a commercial venture. Moreover she did not use the *invitation* as a subterfuge to hide commercialism and the appellant did not profit by a distribution of the book or by the contribution received. The costs, the items accompanying the book, far exceeded the amount contributed. If it is contended that *Jones* v. *Opelika*, 316 U.S. 584, erroneous precept of this court, permits invoking the doctrine of *Valentine* v. *Chrestensen*, then we submit that the *Valentine* case is unsound and should be overruled because denying liberty of the press to those engaged in commercial activities, thereby discriminating against *commerce* in favor of *politics*. Commerce has the same right to freedom of the press as does labor, a branch of *commerce*, and politics and religion recognized by this court to be covered by the protecting shield of the First and Fourteenth Amendments.

Insofar as the ordinance on its face prohibits the holding or carrying of any folder or circular or advertising matter upon the streets of Dallas the same is arbitrary, unreasonable and in excess of the police power. It is void because the means employed have no reasonable relation to the ends aimed for by the ordinance. No reasonable person can say that any of the interests which the state is permitted to protect can possibly be affected even remotely by the carrying of a sign, advertisement or placard

of any kind. If such a law could be sustained, then there is nothing to prevent the state from taking similar unreasonable steps over the person by such as prohibiting a woman from wearing an orange-colored hat on St. Patrick's Day, or passing a law requiring any other such unreasonable thing. In this respect the ordinance is invalid, as was held in *Weaver* v. *Palmer Bros. Co.*, 270 U.S. 402; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U.S. 613, 622; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204. See Freund's *The Police Power*, page 133.

With respect to the right to full review of the judgment in a higher court of Texas it is our contention that if the case of *Ex parte Daisy Largent*, 162 S.W. 2d 419, is permitted to stand, at most only a partial review is allowed by habeas corpus proceedings. In that opinion the court limits the inquiry to whether or not the ordinance is void on its face and refuses to consider the more vital question of whether or not it is unconstitutional as construed and applied to the particular facts. Therefore there is not allowed a full review of the judgment in the courts of Texas.

Moreover, it is not material to the jurisdiction of this court that there is an opportunity for a full review by habeas corpus because under the Judicial Code the appeal is allowed as a matter of right where the judgment is rendered by the court of *last* resort. This court does not have discretionary power to require a citizen who has a right to appeal to the court to first apply for some additional remedy in the state courts where no further direct appeal lies to a higher court as in this case. The rule allowing this requirement in petitions for writ of certiorari does not apply in *appeal cases* under Section 237 (a) of the Judicial Code [28 U.S.C. 344 (a)].

ARGUMENT

ONE

This court should hold that the ordinance in question as construed and applied abridges and prohibits exercise of appellant's fundamental personal right of freedom to worship Almighty God Jehovah, contrary to the First and Fourteenth Amendments to the United States Constitution.

Freedom to worship Almighty God Jehovah according to dictates of one's own conscience and as commanded by the Creator in His written Word is one of the rights secured by the First Amendment made effective against the states by the injunctions contained in the Fourteenth Amendment. *Cantwell* v. *Connecticut*, 310 U.S. 296.

The stipulation is that appellant was and is an ordained minister of Jehovah God in a covenant with Jehovah to act as His witness concerning His Kingdom of Righteousness. That appellant is associated with other ambassadors of The Kingdom in Dallas, Texas. That in addition to preaching from house to house in the city appellant and other of Jehovah's witnesses arranged for public lecture to be delivered on the Bible subject "Peace—Can It Last?" It is agreed that appellant believed it was her duty as a minister of this gospel to advertise this important Bible talk by means of distribution of the invitations. It was stipulated that this was her method of preaching the gospel.

Preaching of the gospel in this manner is not for the private, personal benefit of the individual so preaching or the benevolent corporation used by Jehovah's witnesses to carry on their activity in an organized and orderly way. The purpose, aim and effect of appellant's distribution of the written invitations was only to enlighten and benefit persons willing to attend the public gathering and receive the benefit of hearing the revealed Word of Jehovah God.

Since some of the members of this court, in the *Jones* v. *Opelika*, supra, have taken the view that the activity of Jehovah's witnesses is not "religious worship" or takes on more of a commercial aspect, and since the court has held in the *Valentine* v. *Chrestensen* case that advertising of commercial ventures can be prohibited, it is necessary to discuss the nature of *the thing* advertised on the written folder or invitation which appellant distributed, to show that neither the book nor the advertised meeting can be condemned as commercial.

It should be noticed that the leaflet contained the invitation printed on both sides. The primary aim of the leaflet was to invite the people to attend the public meeting. Mentioning of the book "Children" was only incidental. Therefore it cannot be claimed, as was found in the *Chrestensen* case, that the purpose of the invitation was a subterfuge to hide the advertisement of the book.

Moreover, the *Chrestensen* decision is not applicable, assuming that the leaflet was advertising the book, because the stipulation and the book show that it related to and contained information and opinion in the public interest the distribution of which is protected by the Constitution against abridgment.

Now we turn to a discussion of whether or not the lecture "PEACE—Can It Last?" related to a commercial matter so as to make the invitation commercial advertising. The setting for the discourse was not commercial. The invitation said and the parties stipulated that there was to be and was no collection of money contribution and no admission charge. Thus it was admittedly charitable, philanthropic and benevolent. The subject related to a discussion of post-war conditions, which is a matter of public interest, convenience and necessity.

The discourse as actually delivered was printed and made a part of the stipulation. It was based primarily upon a disclosure of the meaning and application of the 17th chapter of Revelation and an insight into future events as

they relate to current happenings in the war now being fought by world powers for *world domination*. To show that it does not relate to a commercial venture but only to the perfect Word of God, the Bible, this summary thereof is given.

SUMMARY OF LECTURE

The speech "PEACE—Can It Last?" is based upon an understanding of the 17th chapter of the Bible book of *Revelation* concerning the beast that "was, and is not, and shall be present" and the harlot spoken of in connection with this beast. The *beast* pictures the Combine of nations (similar in form to the League of Nations that "was" and now "is not") that shall arise from the present-day world powers' fighting for world domination. The *harlot* pictures the giant religious organization allied with totalitarian nations.

History is traced since the Reformation, showing progress of humanity under the liberal democratic protestant governments maintaining a separation of Church and State. An abridged review is given of the revengeful conspiracy of hatred by the *alliance* from which the liberal democratic governments broke away. Plans of present-day totalitarian, absolute, autocratic governments and their religious partner to destroy the liberal governments and their constitutions are plainly portrayed.

The Roman Catholic Hierarchy, distinguished from the honest Catholic population, claims the right to world domination. It is pointed out that if the dictators do not win the war over the democracies *she* will subtlely attempt to obtain the "axis" victory through an unexpected and negotiated peace so as to *sand-bag* and *sabotage* the realization of the victory aims of the democratic nations. The Scriptures clearly declare that no lasting peace can come through such negotiated peace but that the non-catholic democracies will fall for the scheme and help establish the "new order" in the form of a resurrected league of

nations in which the Roman Catholic Hierarchy will act as arbiter and dominate all countries for "an hour" or short season, with full authority and control such as *she* enjoyed during the Holy Roman Empire of the German Nation, the strangle-hold of which was broken at Westphalia.

It is made plain that with the complete world-wide establishment of this combine in every nation the things held dear to all *liberty-lovers*, namely, freedom of speech, press and worship for those who do not agree with the *new order* will be denied and in place of the compacts of liberty will be established concordats of oppression and tyranny, in which the climax will be reached by a *world-wide* violent opposition against God's kingdom and His witnesses. When these plans are completely executed they will cry *Peace and Safety!* Then what will happen? The talk shows that sudden and unexpected destruction will come upon *her*, and all other "recognized" religions, as she gets bucked off the back of the beast. This shows conclusively that the "cry" that Jehovah's witnesses are attempting to destroy religion will be disproved. The statement of the speaker is apropos, to wit, "Will the religionists and all other persecutors of Jehovah's witnesses take note, please, that it is not Jehovah's faithful witnesses that will thus violently break up 'organized religion'. The world powers will do it, the very ones with whom religion is committing spiritual fornication by making common cause with them against Jehovah's Theocracy and those who bear witness to it.—Ezekiel 16: 28-43; 23: 17-31." R. 30.

This climax will be followed immediately by the complete everlasting destruction of all of Satan's organization and beastly rule to be succeeded by full expansion throughout the earth of God's kingdom, as foretold in Daniel 2: 44, which will bring lasting and eternal peace under the King Father, Christ Jesus the "Prince of Peace". As to this peace the speaker said: "Concerning the freedom from war, freedom from want, and freedom from fear on the

part of those who survive Armageddon and enter the New World under The Theocracy it is written: 'Nation shall not lift up a sword against nation, neither shall they learn war any more. But they shall sit every man under his vine and under his fig tree; and none shall make them afraid: for the mouth of the LORD [Jehovah] of hosts hath spoken it.'—Micah 4: 3, 4." R. 33.

[END OF SUMMARY OF LECTURE]

From the foregoing it is plain, then, that the advertised meeting and lecture to which the public were invited did not constitute a commercial venture of the sort condemned in the *Chrestensen* case; but is that sort of activity which is protected by the Constitution.

Appellee objects to contents of the speech because it makes a scriptural exposé of the religious organization at Vatican City, saying that it is the ultimate in intolerance. Appellee would also charge the signers of the Texas Declaration of Independence with the same intolerance and abridge the right of the citizens of Texas to advertise upon the streets the contents of such Declaration, or to tell others how it could be obtained. Houston, Maverick, Fisher and other signers condemned the same religious organization as being the usual instrument of tyrants and the eternal enemy of civil liberty. See Vernon's Texas Statutes, Centennial Edition.

It is not within the power of the state or this court to say that the activity of appellant in going upon the public sidewalks to advertise the public meeting was not a proper way to worship Almighty God. If the courts were to enter upon the domain of what are proper or genuine "religious" beliefs and practices and *decide* whether certain acts are "religious", then indeed liberty and freedom of worship would vanish. The safety of the citizen on these questions would no longer depend upon the Constitution but upon the *religious* complexion of the court.

Incompetency of the courts to judge such matters, as was attempted in the *Jones* v. *Opelika* cases was declared early in the history of this republic by Thomas Jefferson in the *Virginia Statute for Religious Freedom* (Section 34 of Virginia Code), cited with approval in *Reynolds* v. *United States,* 98 U.S. 145, 162.

The matter of determining whether a particular belief or practice is reasonable or unreasonable is a matter for the individual conscience. See *State of Kansas* v. *Smith,* 155 Kans. 588, 127 P. 2d 518. Judge Parker stated this matter well in *Barnette et al.* v. *West Virginia State Board of Education,* 47 F. Supp. 251, where he said:

> "Courts may decide whether the public welfare is jeopardized by acts done or omitted because of religious belief; but they have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience. There is hardly a group of religious people to be found in the world who do not hold to beliefs and regard practices as important which seem utterly foolish and lacking in reason to others equally wise and religious; and for the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable would be for them to embark upon a hopeless undertaking and one which would inevitably result in the end of religious liberty."[1]

In the *Cantwell* opinion of this Court (310 U.S. 296) the activity of Jehovah's witnesses was recognized as within the definition of "religious activity" protected by the Constitution.

Since it is conclusively presumed that the activity of appellant is acts of worship of Almighty God there can

[1] Cf. *Jones* v. *Opelika,* supra, where Mr. Justice Reed said: "If we were to assume, as is here argued, that the licensed activities involve religious rites, a different question would be presented."

be no question that her freedom to worship secured by the Constitution against abridgment has been wrongfully infringed.

Every person who is in a covenant with Jehovah is duty-bound to obey the law of Almighty God which requires that he follow in the footsteps of His Son, Christ Jesus, by giving public witness to the name and word of Jehovah. (Psalm 40:8; 1 Peter 2:9, 21) Jesus Christ said: "Go ye into all the world and preach the gospel to every creature." (Mark 16:15) It is written that He taught publicly in the market places, upon the streets and from house to house, as did also His apostles. (Mark 6:6; Luke 8:1; 13:26; Acts 5:42; 20:20; Proverbs 1:20, 21) A minister of the gospel who follows in the footsteps of Christ Jesus must be a witness for Jehovah, the Almighty God.—Isaiah 43:10-12; 44:8.

Jesus said that He came into the world for only one purpose, namely, to bear witness to the truthful promise of Almighty God to set up His Theocratic Government to rule the entire earth in righteousness. (John 18:37) According to Matthew 24:14, Jesus commands His followers thus: "This gospel of the kingdom shall be preached in all the world for a witness unto all nations; and then shall the end come." Jehovah's witnesses are commanded thus to proclaim His written judgments against Christendom, 'publicly and throughout every city until the cities are desolate'!—Isaiah 6:1-11.

God's law and the requirements of the covenant into which He has taken His ministers, such as appellant, are supreme. (Blackstone, *Commentaries*, Chase 3d ed., pp. 5-7) Neither human creatures nor human powers can set aside the requirements of the law of Almighty God, nor prevent the individual conscientiously to obey the God-given mandate. Nor can such prevention be accomplished by mob violence or by laws mischievously framed or misapplied by ill-advised men. (Cooley, *Constitutional Limitations*, 8th ed., p. 968) When confronted with inconsistent demands

of the two, Jehovah's servants adopt the answer He provided, to wit, "We ought to obey God rather than men." (Acts 5:29) Appellant desires life which comes only from Jehovah God to those only who are obedient to His perfect law. (Psalm 36:9; John 17:3). The law of Jehovah is perfect, the statutes of Jehovah are right . . . the commandment of Jehovah is pure." (Psalm 19:7, 8) Jehovah's witnesses are ambassadors for Jehovah's Theocratic Government under Christ Jesus. (2 Corinthians 5:20; Ephesians 6:20; Jeremiah 49:14; Obadiah 1) Hence the City of Dallas does not and cannot have jurisdiction to intervene by stretching an inapplicable law so as to encumber, regulate and interfere with this commission. Appellant could not yield to the demand of the police under the law because such would make her a covenant-breaker worthy of death. (Romans 1:31, 32) The law of Jehovah never changes. (Malachi 3:6) He saves those who love and serve Him, but all the wicked and all who forget Him He will destroy. (Psalm 145:20) Jehovah God keeps all His promises.—Isaiah 46:11.

The supersusceptibilities of some persons in the City of Dallas, demonstrating a very intolerant attitude toward others with whom they do not agree, is the basis of the City's contention ruling every person off the streets who does not agree with the majority rule of the city. This is well demonstrated in the quotation from the "Motion to Dismiss or Affirm Appeal" filed in this cause, to wit:

> "This Court has many times discussed the question of freedom of speech and freedom of religion but has never taken the occasion to consider the reverse of the situation, i. e., the rights of other individuals to be free *from* the speech and religion of persons like this appellant. The public is entitled to be free from harassment and annoyance from attempts by people like appellant to force their speech and religion upon them."

This statement is contrary to the stipulation that the appellant was orderly, quiet, did not scatter or throw the handbills about and *did not offend anyone.* (R. 9-10) There is no abuse of the privilege shown in the record and there can be none claimed by any reasonable person. Furthermore the ordinance is not directed at the abuse of the privilege.

Appellee argues that the state has absolute ownership and control of the streets of Texas and cites *Davis* v. *Commonwealth,* 167 U. S. 44. The doctrine of absolute ownership and control, so as to *legislate* off the street persons who are using the same for purpose of dissemination of information and opinion, was expressly rejected in *Hague* v. *C. I. O.,* 307 U. S. 496, where it was expressly held that the *Davis* case did not apply to use such as made in this case. There, speaking by Mr. Justice Roberts, this Court said:

> "We have no occasion to determine whether, on the facts disclosed, the *Davis Case* was rightly decided, but WE CANNOT AGREE THAT IT RULES THE INSTANT CASE. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been USED FOR PURPOSES OF ASSEMBLY, COMMUNICATING THOUGHTS BETWEEN CITIZENS, and DISCUSSING PUBLIC QUESTIONS. Such use of the streets and public places has, from ancient times, been a part of the PRIVILEGES, IMMUNITIES, RIGHTS, and LIBERTIES OF CITIZENS. The privilege of a citizen of the United States to use the streets and parks for COMMUNICATING VIEWS ON NATIONAL QUESTIONS may be regulated [not *prohibited*] in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order;

but IT MUST NOT, IN THE GUISE OF REGULATION, BE ABRIDGED OR DENIED." [Capitalization and bracketed words added]

The authorities relied upon by appellee holding the absolute right in the state to prevent or control the use of the streets for purposes of operating a business such as common carriers, taxicabs, peddlers of ordinary articles of merchandise, etc., do not apply here because in those cases there is no specific constitutional guarantee of the right exercised, as *exists* in this case.

It is argued extensively that the city and state are forced to furnish a forum or place of worship to appellant contrary to the Constitution by permitting her to exercise her right by distributing the leaflet, and that if appellant is permitted then all others could make use of the streets for religious services such as holding communion, mass, etc., and usurp the power of the city to control its streets. Appellant does not claim the right to move a "church house" into Commerce Street or Montclair Street in Dallas. "Freedom of press" would not permit one to set up a printing-press on the sidewalk along Akard Street, nor a giant newsstand on the sidewalk along Main Street in Dallas. Appellant recognizes the right of the city to prevent the appropriation of the streets to *private* use to the exclusion of passage and travel by others. Such abuses can be punished and prohibited, and regulation to prevent such results can be rightly enacted.

Appellant was not abusing any right or privilege. In actual *use* of the sidewalk, she was not doing more than the police officer who arrested her. She was not using nearly as much space of the sidewalk as the officer because she is about half the size of the officer. All that she was doing was walking down the street handing out handbills. It is not contended that she blocked traffic or forced anyone off the streets or that the use of the streets and sidewalks by others was interfered with. Appellee makes a mountain

out of a mole hill; and in an effort to persuade the court that appellant was worshiping on the streets to the exclusion of the religions of Dallas, appellee strains at the gnat and swallows the camel!

Appellant does not have or claim any higher use of the streets than the clergy of Dallas. It must be conceded that the clergy of the protestant denominations and the priests of the Roman Catholic hierarchy would have EQUAL RIGHT to advertise a religious meeting or gathering to hear a sermon, attend mass or communion, or for any other proper purpose. No one would have the hardihood to contend that such clergy, when so using Dallas streets, would be moving their edifices into those streets to the exclusion of travelers and vehicles because they handed out invitations to the public, but appellee makes that sort of argument here.

With these sound basic principles in mind, the respective rights of the state and the citizen become clear. The people themselves are owners of the forum—living and *exercising* their rights not by sufferance of "the state" but by reason of their inalienable right to live and *act* as free men.

In America, as distinguished from the foreign *authoritarian* form of government, THE PEOPLE comprise the source or fountain of all law and authority of "the state". In America "the state" is only a creation of the whole people and exists by *their* sufferance. The delegated authority of the national and state governments of this Union is limited by their respective constitutions. The people, being entirely sovereign, are not dependent on "the state" to grant, allow or furnish them with a *forum* in which to exercise the rights of free men. On the contrary, "the state" is the vehicle designed by the people to insure to ALL, *including* minorities and individuals, free enjoyment of rights which the founding fathers of the new union of states considered to be fundamental, inalienable, inherent —possessed equally by all, rich and poor, bond and free, black and white, regardless of creed or native citizenship.

To make the incredible assertion, as does appellee, that the state's "propietary rights in the streets are no less than those of a private owner" of property, is to attack directly the most basic principle of "government by the people"—to attack in the manner 'dreamed' of by sympathizers with dictatorial or totalitarian principles of government.

Appellee contends that the state has *absolute control* over streets belonging to the people. This compares well with "judicial" pronouncements of Adolph Hitler, e. g.,

> "The state is the great, powerful weapon to be used . . . in the battle, the eternal battle, for life [world domination], a weapon to which everyone must submit, because it expresses a common will."—*Mein Kampf*, "The State," Chapter XIV.

We submit that under the American Constitution the people are *sovereign*, and in the realm of civil liberties "the state" is shorn of all authority except "police power" to regulate, which denies "the state" any authority to grant "indulgences" or "absolution" to any "sect", as appellee wrongly claims it is ASKED to do.

The difficulty with appellee is that it has a narrow-gauge mental view of what constitutes *worship* by confining it to *traditional* and orthodox methods of preaching from a pulpit in an edifice. Appellee would rule out completely the older Christlike and apostolic way of preaching which is by going upon the streets, the public places, the market places, and in the highways and by ways. The court cannot restrict the *mode of worship* as contended for by appellee without establishing a state religion, discriminating in favor of "traditional" and orthodox methods and overruling prior decisions of this court protecting against such encroachment upon the method Jehovah's witnesses employ.

Appellee contends that acceptance of money or the offer to accept money, even though no profit is made,

constitutes a "sale" and "offer to sell" and thus makes the activity "commercial". Appellee uses as the basis for this contention this court's ruling in *Jones* v. *Opelika*, supra. Stripped of all its sophistry, the argument is that freedom of press and freedom of worship mean that one must *give* literature away free of any money contribution or help; that if money tendered is received, the constitutional shield is dynamited to pieces and the state can rush in and legislate to prohibit, censor and regulate in any form which the legislative judgment may direct. No more dangerous doctrine has ever been invented by the mind of man than that the provisions of the Constitution can be suspended when it is shown that money is received or that profit is made. Such a doctrine means the end of constitutional liberty and makes the Bill of Rights a scrap of paper. Every student of American history knows that the pamphlets of Thomas Paine were not given away free of charge. See *Columbia Encyclopedia*, "Pamphlet"; *Encyclopedia Britannica*, Vol. 20, Pamphlets, pp. 659-660. *Commonwealth* v. *Reid*, 144 Pa. S. C. 569, 20 A. 2d 841.

If this court really did what the appellee says it did in *Jones v. Opelika*, supra; that is, LIMIT the freedoms to those financially able and wealthy enough to operate without accepting money contributions, then we submit that this court should hasten to make correction by setting aside its *Jones* v. *Opelika* decision with the judgment appealed here from the court below.

The construction and application given the ordinance prohibits absolutely the worship and service of Almighty God on the sidewalks of the city, in an orderly and proper manner, and is therefore unconstitutional and void to the extent that it has been applied to the admitted acts of worship performed by appellant.

TWO

This court should hold that the ordinance by its terms and as construed and applied expressly abridges and prohibits exercise by appellant of her fundamental personal rights of freedom of assembly, of speech, and of the press, contrary to the First and Fourteenth Amendments to the United States Constitution.

It is stipulated that the appellant was exercising her fundamental rights of freedoms of assembly, speech and press, in distributing the written invitation and leaflet.

It is too well settled to require argument that these *fundamental personal rights* are guaranteed by the First Amendment and secured against abridgment by the state through passage of the Fourteenth Amendment. *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Near* v. *Minnesota*, 283 U.S. 697; *Lovell* v. *Griffin*, 303 U.S. 444; *Schneider* v. *State*, 308 U.S. 147; *Cantwell* v. *Connecticut*, supra.

Even under the doctrine of *Jones* v. *Opelika*, supra, the ordinance is admittedly unconstitutional and void because it is absolutely prohibitory and is not regulatory. In the *Jones* v. *Opelika* opinion the majority said: "Ordinances absolutely prohibiting the exercise of this right to disseminate information are, *a fortiori*, invalid." We rely upon *Hague* v. *C.I.O.*, 307 U.S. 496, 501 and 518, as authority here. There this Court held unconstitutional the Jersey City ordinance which forbade any person in the city "to distribute or cause to be distributed or strewn about any street or public place any newspaper, paper, periodical, book, magazine, circular, card, or pamphlet." It was so declared because the ordinance was an abridgment of freedoms of assembly, speech and press.

The Dallas ordinance prohibits a person from carrying or holding any advertisement matter. It prohibits scatter-

ing of leaflets, which the courts below construe to mean the distribution thereof to others.

The ordinance is void under the decision of this court in *Schneider* v. *State*, 308 U.S. 147, where the Los Angeles, Milwaukee and Worcester ordinances containing identical provisions were declared to be in violation of the 1st and 14th amendments because abridging the rights of freedoms of speech and press. It is noticed that in the Los Angeles case the hand-bill had a commercial taint, which cannot rightly be claimed concerning the invitation here. In that case Mr. Justice Roberts said:

> "On the hand-bill were the words 'Admission 25c and 50c'. The Superior Court adverted to these and said: 'Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the cards themselves seem to fall within the classification of commercial advertising rather than the expression of one's views.'"

There this Court also declared that the streets were the natural and proper places for the dissemination of information and opinion, and held that one cannot be denied the exercise of this right on the theory that it would be more convenient to the *majority* to have the rights exercised in some other place. Further the court said:

> "The motive of the legislation under attack in Numbers 13, 18 and 29 is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encouraged or resulted in such littering. *We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person*

> *rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.* This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." [Italics added]

The holding of the court below conflicts directly with *Thornhill* v. *Alabama*, 310 U.S. 88, and *Carlson* v. *California*, 310 U.S. 106, where similar prohibitory legislation was declared unconstitutional. See also *Near* v. *Minnesota*, 283 U.S. 697.

Because the ordinance affects distribution and not printing does not save it. Distribution is the very life of the press. Without distribution printing is of little or no value. In the case of *Lovell* v. *Griffin*, 303 U.S. 444, it is said:

> "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Ex parte Jackson*, 96 U.S. 727, 733."

Of and concerning this character of ordinance in *Zimmermann* v. *London*, 38 F. Supp. 582, it was said: "In the case now before this Court, the ordinance imposes no censorship upon the 'free and unhampered distribution of pamphlets'; it imposes what amounts to a virtual prohibition upon such distribution."

The case of *Valentine* v. *Chrestensen*, supra, is not

applicable here. The meeting here publicized was not for a commercial purpose, as was the purpose advertised in that case, but solely for a charitable and Christian purpose. The meeting advertised here was free of charge and no admission charge was made but in the *Chrestensen* case there was. The book "Children" was mentioned only incidentally with the invitation to attend the meeting. The book was of the nature protected by freedom of press guarantee in that it related to explanation of Bible prophecies and contained Bible information concerning the obligation of parents to bring their children up in the nurture and admonition of the Lord. This is therefore a matter of public interest, convenience and necessity. It is not claimed that appellant sold any such book; however, it was stipulated that appellant did not undertake to distribute the book but that if inquiry were made she would distribute the book to any desiring a copy. It is stipulated that she gave with the book a booklet "Hope" and three study courses to aid in the understanding of the book and its proper use with the Bible. The parties agree that the cost of the book, booklet and study courses exceeds the amount contributed by a recipient, to wit, 25c. Each handbill or invitation was distributed without charge. Here is not found the "commercial advertising" subterfuge that this court found in the *Chrestensen* case. In that case this court announced the principles relied upon here by appellant. In that case this court said: "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares."

The surprising attitude announced on June 8, 1942, by the majority of this court in the *Opelika* cases (316 U.S. 585-600) makes it necessary to discuss further the *Chrestensen* case. As ground for denying constitutional rights in

the *Opelika* cases this court says: "It is enough that money is earned by the sale of articles." On the basis of those *Opelika* cases, it may be argued that this appellant's willingness to distribute *the book* if a request were made, and the fact that she would accept the contribution might justify application of the *Chrestensen* case here.

If the *Chrestensen* doctrine be extended to apply here then, logically, equitably, it must be extended to embrace *every publication* ("vehicle of information and opinion"[2]) that consists at once of *news* and *commercial advertising*. Such 'vehicles' include many well known periodicals daily obtainable on streets throughout this land from peripatetic youths: *Saturday Evening Post, Collier's, Liberty,* etc.

Then freedom of the press means nothing. Then "freedom of press" would mean the freedom exists so long as you are wealthy enough to afford to give away literature without charge, but "freedom" would be denied to those poor enough to need money wherewith to carry on. Such a doctrine would mean the end of *free* press, and every newspaper and periodical in this country could be forced to stop its presses under such a doctrine.

It is a known fact that the greater source of revenue for the newspapers is *commercial advertising* and many *papers* are noticed to contain much more advertising of a commercial nature than news or information, such as the New York *Daily News,* the Los Angeles *Times,* the Boston *Post,* and the Dallas *News.*

The only difference between the condemned LEAFLET in the *Chrestensen* case and each copy of any issue of any large metropolitan newspaper is the size and number of sheets delivered by the ultimate distributor, whether he be an ambulating vendor or the custodian of a newsstand. Often some such *news*papers have as much as seventy (70%) percent of the entire space devoted to advertisement of a commercial nature. Rural newspapers are no exception to this statement.

---

[2] *Lovell* v. *Griffin,* 303 U. S. 444, 452.

Advertising of a commercial nature is the chief means of revenue for the newspapers. If the *Chrestensen* doctrine be sustained for long it would mean the end of commercial newspapers.[3] We cannot understand how this court can be so clear as it states itself to be with respect to "purely commercial advertising" when it has so strongly supported the protection of advertising of labor matters and labor controversies which constitute only one element of "commerce". In the one instance "services" are SOLD (by the laborers) while in the other instance, such as in the *Chrestensen* case, other material values are SOLD, or in the case of the merchant it is goods that are to be SOLD. *Politics, commerce* and *religion* stand on the same level under the First Amendment. While we think the *Chrestensen* case is inapplicable here, it is thought appropriate here to mention this apparent oversight in that case.

The police power relied upon in sustaining the New York City ordinance in that case does not authorize the step here because here both the matter advertised and the meeting to which the public were invited did relate to public information and opinion of vital importance. Therefore the Dallas ordinance is confronted here with the barrier of the constitutional protection of the rights of freedom of worship and of the press. In *Schneider* v. *State,* supra, Mr. Justice Roberts said: "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." In *Herndon* v. *Lowry,* 301 U.S. 242, this court said: "The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principles of the Constitution."

[3] Cf. *Grosjean* v. *American Press Co.*, 297 U.S. 233, holding unconstitutional a tax on commercial advertisement in newspapers.

This court also held in the case of *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, that a "narrower scope for the presumption of constitutionality" prevails when legislation within specific prohibitions of the first ten amendments to the Constitution is before the court.

Even though it may be said that the *Chrestensen* case is unsound and does not properly state the law, it is nevertheless not controlling here because the activity here is admittedly the exercise of fundamental personal rights within the protecting shield of the 1st and 14th Amendments.

THREE

This court should hold that the ordinance is void on its face because it provides for unreasonable and arbitrary means which have no reasonable relation to the ends aimed for nor to the police powers of the state, contrary to the Fourteenth Amendment to the United States Constitution.

Even when applied to commercial advertisement of every kind and character the ordinance is unconstitutional because it is void on its face. It is unlawful interference with and prohibition of the exercise of any lawful business conducted in a proper manner. The law does not purport to be regulatory. It is not possible for one to engage in such activity at any time or any place within the city. This provision is unreasonable and arbitrary and has no reasonable relation to the ends aimed for by the ordinance. It violates the principles announced in Freund's *The Police Power*, pages 133 and 497. See also *Weaver* v. *Palmer Bros. Co.*, 270 U.S. 402; *Smith* v. *Texas*, 233 U.S. 630; *Dobbins* v. *Los Angeles*, 195 U.S. 223; *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25; *Eubank* v. *Richmond*, 226 U.S. 137; *Panhandle E. Pipe Line Co.* v. *State H'way Com'n*, 294 U.S. 613, 622.

In *Jay Burns Baking Co.* v. *Bryan*, 264 U.S. 504, this court said: "A state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." See also 3 *McQuillen on Municipal Corporations*, 2d ed., p. 122; *Lawton* v. *Steele*, 152 U.S. 133, 137; *Mugler* v. *Kansas*, 123 U.S. 623.

It should be kept in mind that what is here prohibited is "press activity" and not commercial business of selling and peddling ordinary articles of merchandise upon the streets. In its broad scope all sorts of advertising is included. The ordinance is unreasonable and does not impose fair means of regulation but absolutely prohibits the exercise of this right which is not within the scope of the police powers of the state.

It is submitted that the ordinance is void on its face and therefore unconstitutional.

FOUR

This court should hold that under Section 237 (a) of the Judicial Code [28 U.S.C. 344 (a)] the appeal provided for therein from a final judgment of the highest court of Texas in which a decision can be had cannot be refused review by this court until application for writ of habeas corpus is presented and refused by some higher court of Texas.

At the threshold to consideration of the question of the Court's jurisdiction, which some opine depends upon whether or not the judgment of the court below is subject to further review in a higher court of Texas, this Court is confronted with the proposition that this case comes here by *appeal*, as a matter of right, and not by *petition for writ of certiorari*, the granting of which is discretionary with this Court. In *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert* (1917) 245 U. S. 162, 165, this Court said that

the difference between writ of error, now appeal, provided in the Judicial Code, and *certiorari* "lies in the fact that a writ of error is granted as of right, while a writ of certiorari is granted or refused in the exercise of sound discretion."

Such requirement cannot be insisted upon in the case at bar because—

(1) Appellant is here as a matter of right from the highest court of Texas in which a decision can be had; and

(2) We do not have right of full review of the judgment but only a partial review.

This APPEAL satisfies the requirements of Section 237 (a) of the Judicial Code, 28 U. S. C. A. 344, so as to confer jurisdiction upon this Court to consider the substantial *federal questions* here presented.

By Article 53 of the Texas Code of Criminal Procedure the judgment of the court below is made final in a case of this kind and no further right of appeal to a higher state court is allowed. The Court of Criminal Appeals, in conformity with the mandate and injunction contained in Article 53, has consistently held that a direct appeal does not lie from a judgment of the County Court where the fine imposed on trial *de novo* did not exceed $100 and costs in cases originating in the justice or corporation courts. The judgment of the County Court is final and such court is the *highest court* in which a decision can be had. *Hodge* v. *State,* 137 Tex. Cr. R. 195, 128 S. W. 2d 1205; *Phillips* v. *State,* 138 Tex. Cr. R. 9, 133 S. W. 2d 580; *Harlan* v. *State,* 138 Tex. Cr. R. 47, 134 S. W. 2d 289; *Conley* v. *State,* 141 Tex. Cr. R. 478, 149 S. W. 2d 99; *Spann* v. *State,* 161 S. W. 2d 494; and *Ragsdale* v. *State,* 120 Tex. Cr. R. 63, 47 S. W. 2d 278.

Being the highest court in which a decision could be had in this case in the State of Texas, it was not necessary that appellant thereafter begin a new proceeding in some other court to obtain relief from the judgment. In *Gregory* v. *McVeigh,* 23 Wall. 294, 306, a writ of error issued to

the Corporation Court of Alexandria, Virginia. There was a motion to dismiss for want of jurisdiction because, as there alleged by defendant in error, such was not the highest court of the state in which a decision could be had. The writ of habeas corpus was available under Virginia law to the plaintiff in error, but such was not applied for in that case nor did this Court in overruling the motion to dismiss discuss that question. See also *Downham* v. *Alexandria*, 9 Wall. 659, appeal from the District Court, and also *Cohens* v. *Virginia*, 6 Wheat. 264.

In another case originating in Texas, *Grovey* v. *Townsend*, 295 U. S. 45, it was held that this Court had jurisdiction on appeal directly from the justice court. There the plaintiff sued for damages in amount less than $20 for alleged violation of Texas election laws. The statutes of Texas prevented a further appeal to the County Court because the amount sued for did not exceed $20 and costs. It was held that the justice court was the highest court in which a decision could be had in that case in the State of Texas, and for that reason this Court took jurisdiction and decided the case on the merits.

Neither the case of *Tenner* v. *Dullea*, 314 U. S. 585, 692, No. 713 October Term 1941, nor the older case of *Mooney* v. *Holohan*, 294 U. S. 103, 115, gives the theory urged against jurisdiction of this case any comfort or strength in argument. Both of these cases involved "discretionary powers" of this Court. The *Tenner* case was a petition for writ of habeas corpus presented originally to the Superior Court of San Francisco, California. The Constitution, statutes and decisions of California, although denying an appeal from such decision of the Superior Court refusing the application, specifically allow presentation of successive *original* applications for writs to the District Court of Appeals and to the Supreme Court of California where full hearing is allowed on all issues involved. There was no decision or statute which limited the jurisdiction of such courts in habeas corpus as exists

in Texas. The Texas Court of Criminal Appeals denies original habeas corpus jurisdiction in such cases as these. The *Tenner* case was brought to this Court by petition for a *discretionary writ*, the writ of certiorari, and not by appeal. *This case is here on appeal.*

The other ground of distinction is that this is a direct appeal from the judgment of conviction and not an app l from proceedings which are discretionary, as this Court holds *habeas corpus proceedings* to be.

In the *Mooney* case, supra, the effort was made to apply directly to this Court in an original application for a writ of *habeas corpus* to have this *federal court* relieve the petitioner from the force of a state judgment rendered against him under a state penal statute. His application was addressed to the *sound discretion* of this Court on original motion for leave to file such application. It did not involve a direct appeal from the judgment of conviction. In the exercise of its discretion this Court denied the motion for leave to file on the grounds that Mooney had not invoked the corrective judicial remedy of habeas corpus afforded by the state of California, then open to him. An entirely different proposition is involved in the case at bar. What is here presented is an appeal as a matter of right under an Act of Congress where there is drawn in question the validity of *state legislation* under the Constitution of the United States.

In that case the California courts were open to Mooney to make the same full complaint against the judgment as he was making before this Court on his motion for leave to file petition for writ of habeas corpus. Here there is not claimed to be in Texas a remedy as full as that afforded under the Judicial Code allowing an appeal. At best the most appellee claims available to appellant is the 'narrow way' of procedure, allowing only partial review, before the Court of Criminal Appeals, *as to whether or not the ordinance is void on its face and by its terms.* It is conceded that in the courts of Texas there is no

broader way to review by any process or proceedings the other and more extensive question of whether or not the ordinance is applied so as to abridge and deny appellant's constitutional rights of free speech, press and worship guaranteed by the 1st and 14th amendments.

The *Mooney* and *Tenner* cases are decisively distinguished from the case at bar by this Court in the case of *Edwards* v. *California,* 314 U. S. 160, where this Court entertained a direct appeal from the Superior Court of Yuba County, California. No further appeal was allowed to a higher court of California; however, there was available the remedy of the writ of habeas corpus under the law and practice of California. *California Constitution, Article VI, sections* 1, 4, 4b *and* 5. *Matter of Perkins,* 2 Cal. 424; *California Penal Code,* section 1475, and *Matter of Zaney,* 164 Cal. 724, 727.

In the case of *Kim Young,* appellant, v. The People of the State of California (joined with *Schneider* v. *State* at 308 U. S. 147) appeal was allowed from the Superior Court of Los Angeles County. In that state a writ of habeas corpus could have been applied for to the District Court of Appeals or to the Supreme Court of California, as provided by California statutes. This Court did not discuss the jurisdictional question at length, but said: "The Superior Court of Los Angeles County affirmed the judgment. That court being the highest court in the State authorized to pass upon such a case, an appeal to this court was allowed."

Earlier cases in which this Court entertained writs of error, now appeals, are cited in *Kentucky* v. *Powers,* 201 U. S. 1, and other cases cited at page 2, supra. See also *U. S. C. A. Title* 28 *Section* 344, *note* 32.

Moreover, the rule laid down in the *Mooney* and *Tenner* cases is based merely on considerations of "orderly procedure" and proper exercise of this Court's discretion; but, a mere rule of practice should never be permitted to override a constitutional right or the statutory right

of appeal allowed under the Judicial Code. *Agnello* v. *United States*, 269 U. S. 20.

That this is a final judgment subject to review by this court there can be no doubt, as was held in *Betts* v. *Brady*, 316 U. S. 455, 460-461. There this Court said:

> "It is true that the order was not final, and the petitioner has not exhausted state remedies in the sense that in Maryland, as in England, in many of the states, and in the federal courts, a prisoner may apply successively to one judge after another and to one court after another without exhausting his right. We think this circumstance does not deny to the judgment in a given case the quality of finality requisite to this court's jurisdiction. Although the judgment is final in the sense that it is not subject to review by any other court of the State, we may, in our *discretion*, refuse the writ when there is a higher court of the State to which another petition for the relief sought could be addressed, but this is not such a case."

We submit that this Court should hold that its jurisdiction in the case at bar is not impaired by any such rule advanced by appellee.

Under all the circumstances of this case this Honorable Court should assume jurisdiction. In *Cohens* v. *Virginia* (1821) 6 Wheat. 264, 404, Mr. Chief Justice Marshall said:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exer-

cise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."

FIVE.

This court should hold that under the law and practice of Texas there was not and is not an opportunity for further full review of the judgment in a higher court of Texas by way of writ of habeas corpus or other proceedings.

Now we turn to a consideration of the question of whether or not under the law and practice of Texas the judgment can be *fully reviewed* on this record by a higher state court by habeas corpus or other proceedings.

PRIOR to the holding of the Texas Court of Criminal Appeals in the case of *Ex parte Largent*, 162 S. W. 2d 419, it would have been admitted by us that a further review could be had by way of writ of habeas corpus; but *since* such decision, unjustifiably overruling previous holdings allowing a review, it can now be definitely stated that the remedy of habeas corpus in the District Court and Court of Criminal Appeals does not afford appellant a *full review* of the judgment.

The rule adopted by the Court of Criminal Appeals, which must be followed by the district courts, is that in this type of judgment rendered in the county court the inquiry is limited to the one question, to wit, *Is the ordinance unconstitutional and void on its face and by its terms?* If it is not, or if the ordinance is unconstitutional only as enforced and applied, the court cannot grant the writ, and if granted it must be denied. That court says that in this type of judgment it cannot make inquiry into what

facts are involved or whether the undisputed evidence shows that the ordinance does not apply.

That a judgment remanding a relator to custody in a habeas corpus proceeding is a final and appealable judgment within the meaning of the Judicial Code defining this Court's jurisdiction on appeal is too well established to require citation of authority. The fact that cases can be brought here by way of habeas corpus does not deny this Court's right to review directly by appeal or certiorari a conviction in a state court. This Court can review both, but the right to review one does not deny the right to review the other. See *Herndon* v. *Georgia*, 295 U.S. 441, and *Herndon* v. *Lowry*, 301 U.S. 242. Therefore, the fact that this Court considered the case of *Collins* v. *Texas*, 223 U.S. 288, habeas corpus proceedings involving the validity of a proceeding brought in the county court under the Unlawful Medical Practice Act of Texas; and *Tinsley* v. *Anderson*, 171 U.S. 101, a review by habeas corpus of an imprisonment for contempt of the district court, does not impair the jurisdiction of this court in this case.

Where no constitutional question is involved, or conviction is not void, it has been invariably the rule of Texas Court of Criminal Appeals in habeas corpus proceedings not to review a judgment of conviction rendered on trial de novo (on appeal from the Justice or Corporation courts) in the County Court where the fine imposed did not exceed $100 and costs. So to do is held to be employing the writ to do indirectly what is prohibited directly by the Code of Criminal Procedure, Article 53. *Ex parte Kent*, 49 Tex. Cr. R. 12, 90 S. W. 168; *Ex parte Rogers*, 83 Tex. Cr. R. 152, 201 S. W. 1157.

In Texas the writ of habeas corpus is declared to be the principal bulwark of human liberty in that State. *Ex parte Calhoun*, 91 S. W. 2d 1047.

In cases where the petition for writ of habeas corpus was brought for the purpose of reviewing the evidence to determine whether or not it was sufficient, or whether or

not there was evidence to sustain the conviction, the Court of Criminal Appeals universally held to the rule that if there was no constitutional question or if the judgment was not void, it would not review by habeas corpus said judgment of conviction in instances where the case originated in the justice or corporation courts and the fine imposed on trial de novo did not exceed $100 and costs. To do so is held to be employing the writ to do indirectly what is prohibited directly by the Code of Criminal Procedure, Article 53. *Ex parte Kent*, 49 Tex. Cr. R. 12, 90 S. W. 168; *Ex parte Rogers*, 83 Tex. Cr. R. 152, 201 S. W. 1157, and *Ex parte Slawson*, 139 Tex. Cr. R. 607, 141 S. W. 2d 609.

There are many recognized exceptions to the above rule. We now turn to a discussion of the cases recognizing these exceptions for the purpose of showing that the decision of the court in the *Largent* case (162 S. W. 2d 419) is fictitious evasion of a properly raised federal question.

In instances where the Court of Criminal Appeals found the ordinance or statute to be unconstitutional on its face the writ of habeas corpus has been unhesitatingly sustained to release one held under a judgment of conviction in the county court on trial de novo in appeals from the justice and corporation courts. In *Ex parte Patterson*, 42 Tex. Cr. R. 256, 58 S. W. 1011, the ordinance was void on its face because it prohibited a bowling alley within 100 yards of a residence. In *Ex parte Spelce*, 119 S. W. 2d 1037, a Dodd City ordinance prohibiting dance hall within 400 feet of churches was held void on its face. *Ex parte Faulkner*, 158 S. W. 2d 525, holds the "Green River" ordinance of Canyon unconstitutional according to its unreasonable terms. *Ex parte Farnsworth*, 61 Tex. Cr. R. 342, 135 S. W. 535, holds an ordinance of Dallas establishing a commission to fix telephone rates, etc., unconstitutional on its face. In *Ex parte Battis*, 40 Tex. Cr. R. 112, 48 S. W. 513, it was an ordinance prohibiting commercial vehicles for hire from parking on certain downtown streets. *Ex parte Neill*, 32

Tex. Cr. R. 275, 22 S. W. 923, holds void a Seguin ordinance prohibiting sale in the city of a certain newspaper declared a nuisance. In *Ex parte Garza*, 28 Tex. Cr. R. 381, a San Antonio ordinance licensing bawdy houses held void on its face.

Prior to the decision of the Court of Criminal Appeals in *Ex parte Largent*, 162 S. W. 2d 419, it was uniformly held that even though the law be valid on its face, if the statute or ordinance did not apply to the facts in the case the defendant was not guilty and was entitled to a discharge by writ of habeas corpus when convicted on trial de novo in the county court and fined not more than $100. In *Ex parte Roquemore*, 131 S. W. 1101, 60 Tex. Cr. R. 282, the writ was granted to discharge the accused who had been convicted of violating the Sunday Law of Texas. He operated a baseball park and baseball game on Sunday. It was held that the statute when properly construed did not cover the activity of the defendant and on the admitted facts he was not guilty. This case was cited with approval by Judge Hawkins in *Ex parte Jarvis*, 3 S. W. 2d 84. In *Ex parte Jonischkiss*, 227 S. W. 952, 88 Tex. Cr. R. 574, it was held that the writ of habeas corpus was available to release one charged with a violation of a city traffic ordinance where the admitted facts did not constitute a crime under the law of Texas. In *Ex parte Butcher*, 53 S. W. 2d 781, 122 Tex. Cr. R. 39, an application for writ of habeas corpus was granted because the court declared that the operator of a laundry did not come within the provisions of a statute prohibiting labor of females more than 54 hours per week. See also *Ex parte Wall*, 91 S. W. 2d 1065; and *Ex parte Jones*, 81 S. W. 2d 706.

Before the decision in *Ex parte Largent*, supra, it was consistently held by the Court of Criminal Appeals that whether an ordinance is constitutional depends on the facts to which it is applied. During such time that court consistently held that in habeas corpus cases it could not

inquire into and determine whether an ordinance was unconstitutional *as construed and applied* to the undisputed evidence and facts of the case. In *Ex parte Baker*, 127 Tex. Cr. R. 589, 78 S. W. 2d 610, 613, the ordinance fixing fees on non-resident business representatives was held to be arbitrary and violative of the 14th Amendment as applied. The writ of habeas corpus was granted. In that case the court said: "It is a familiar rule that the validity of an act is to be determined not alone by its caption and phraseology, but also by its practical operation and effect." In *Ex parte Lewis*, 45 Tex. Cr. R. 1, 73 S. W. 811, it was held that an ordinance valid on its face was unconstitutional because of the provisions of the city charter which was introduced in evidence. In *Ex parte Mihlfread*, 128 Tex. Cr. R. 556, 83 S. W. 2d 347, it was held that an ordinance providing for the license tax upon certain occupations was void because high, excessive and confiscatory under the circumstances of the case. In *Ex parte Ernest*, 136 S. W. 2d 595, 138 Tex. Cr. R. 441, an ordinance providing for sanitary inspection of bakeries was held valid as applied to institutions within the city but invalid as applied to institutions located outside the city. The court considered the evidence. In *Ex parte Kennedy*, 78 S. W. 2d 627, Judge Hawkins wrote the opinion on rehearing. On the original hearing the ordinance was held to be constitutional on its face and the writ was held properly denied. On rehearing, concerning the relator's attack upon the zoning ordinance the court said: "Relator seems to concede that said case is decisive of the question as to the *general attack* upon the constitutionality of said ordinance, but urges that it should be held unconstitutional, *as it relates to the restriction in the use of the particular property of relator involved in the prosecution.*" The court then inquires into the question as to whether the *valid ordinance* has been applied in an unconstitutional manner, and holds that it is not violative of the Federal Constitution as applied. In *Ex parte Stein*, 135 S. W. 136, 61 Tex. Cr. R.

320, the court inquired into the evidence to determine the constitutionality of an ordinance. See *Ex parte Degener*, 17 S. W. 1111, 1114; *Ex parte Kearby*, 34 S. W. 635; 34 S. W. 962; and *Ex parte Dreibelbis*, 133 Tex. Cr. R. 83, 109 S. W. 2d 476.

In his opinion in the *Largent* case Judge Hawkins does not cite or discuss any of the foregoing cases but contents himself with a consideration of the cases originating in the justice or corporation court where there was no constitutional question involved and where habeas corpus was invoked as a substitute for appeal to review the sufficiency of the evidence. *Ex parte Slawson*, 139 Tex. Cr. R. 607, 141 S. W. 2d 609, is said to be controlling. There the defendant was convicted of breaching the peace and contended there was no evidence showing guilt. The case was not within the exception allowing use of the writ in such cases. What was contended in the *Largent* case was that the admitted facts or undisputed evidence showed that relator was not within the terms of the ordinance and if considered within such provisions then such application of the ordinance to the undisputed evidence violated the Federal Constitution.

Concerning the host of cases above enumerated Judge Hawkins in *Ex parte Largent*, supra, says: "If some cases from this court may be found which seem to be in conflict with such holding they are out of harmony with said Art. 53 and the great number of cases construing said article. Either that, or the claimed conflict is more apparent than real." (*Largent* [No. 349 Oct. T. 1942, this Court] R. 27) This shows that the real issue was evaded by that court. The dissenting opinion of Judge Graves in the *Largent* case clearly establishes the fact that the majority holding was fictitious, arbitrary and contrary to the established precedent of Texas.

Unless this Court so holds and reverses the *Largent* case it will be impossible now to say that there is an opportunity for a full review of a judgment of this sort in a higher court of Texas by way of writ of habeas corpus.

Under this type of holding by that court the duty of the state courts to protect citizens from oppressive, discriminatory, burdensome and harsh enforcement of an ordinance so as to abridge the constitutional rights of the citizens *cannot be inquired into on habeas corpus.*

Such a holding therefore makes the United States Supreme Court the only court which can fully review *in one proceeding* ALL questions presented on this appeal.

If we are forced to apply to any of the state courts for further review by a writ of habeas corpus, the court or judge will be confined to considering and determining *whether or not the ordinance on its face violates the federal Constitution;* and then if found valid, an appeal must be taken to the Court of Criminal Appeals. Should that appellate court hold the ordinance valid *on its face* we would have to come to this Court restricted to consideration of the single question, viz., WHETHER THE ORDINANCE ON ITS FACE VIOLATED THE UNITED STATES CONSTITUTION, which is the *only* question the Court of Criminal Appeals says it can consider in habeas corpus proceedings of this kind.

Unless this Court holds that the refusal of the Court of Criminal Appeals, in *Ex parte Largent,* supra, to pass on all constitutional questions presented was a fictitious non-federal disposition to avoid passing on the *real federal question raised,* this Court must, under the rule announced repeatedly, confine its consideration to the federal questions to which the state court restricted its consideration under local procedure in such cases. See *Northw'n Bell Tel. Co.* v. *Nebr. St. Ry. Com'n,* 297 U. S. 471, 473.

Under such practice, if approved in a case of this kind, when the judgment of the Court of Criminal Appeals is disposed of on *void-on-face question* in this Court, in favor of validity of the law, if we desired to have reviewed the question of whether or not the ordinance is *construed and applied* to the facts and undisputed evidence in such a manner as to violate the Federal Constitution it would

be necessary to go back to the trial court and bring up the judgment of such trial court to this Court directly from the trial court.

This Court has approved the practice of taking a second appeal directly to this Court to review the federal questions raised in the record after a first appeal has been taken to state appellate court on the non-federal questions. (*Kentucky* v. *Powers*, 201 U.S. 1, 37) But this rule would not apply here, for in Texas in this type of case no further appeal lies to a higher court to review the judgment on any question. *Kentucky* v. *Powers*, supra, does not warrant a requirement that a new proceeding must be instituted in the state court by habeas corpus as condition to attempting to secure a review of the judgment by appeal under the Judicial Code.

However, if this honorable court, on consideration of the recent opinion of the Court of Criminal Appeals in the *Largent* case, supra, holds that the doctrine of that court in limiting its consideration to the question of *'unconstitutionality on its face and by its terms'* is an unreasonable abridgment of the right of habeas corpus, or is a fictitious non-federal question decided for the purpose of arbitrarily and evasively considering the federal question of whether the ordinance is unconstitutional as construed and applied, the avenue would then be open to secure a full review of the question by habeas corpus. The Court of Criminal Appeals could then be required to consider all proper federal questions correctly raised in the record.

In such event this Court could review all of the questions raised in the trial court and presented on appeal even though evaded and not passed on by the Court of Criminal Appeals.

SUCH would properly provide a defendant a *full review* of the record of conviction *by habeas corpus* in a higher state court in a case of this kind.

This Court has uniformly denied the doctrine and con-

demned the practice of bringing litigation from the state courts in sections, divisions, piecemeal or in parcels. A litigant is allowed only one appeal from the same judgment to the same court, in the same proceeding. See *United States* v. *Girault*, 11 How. 22, 32; *Heike* v. *United States*, 217 U. S. 423, 429.

If the doctrine of the state is correct in its attack upon the jurisdiction of this Court in this case, then a new way has been found which will allow *two* appeals to this court, one from the appellate court and another from the trial court, at different times, involving the same record, the same trial, but different judgments. In one it would be the appellate judgment or judgment in the habeas corpus proceeding, and in the other it would be the judgment of conviction rendered in the criminal proceeding originally instituted. This would compel a multiplicity of actions and appeals and be needless circuity of action. In *Carpenter* v. *Longan*, 16 Wall. 271, 21 L. Ed. 313, this Court held that the parties ought not to be driven from one forum to obtain a remedy which cannot be denied in another forum.

In the circumstance that appellant relied upon the *Largent* case and upon this Court's denial of certiorari in same it would be unjust and a burdensome imposition to drive appellant back to the courts of Texas to seek relief which can be readily granted here, because, at time of appellant's appeal herein, the doors of such courts were closed to a full review of the judgment by habeas corpus.

Appellee makes a frivolous objection to the jurisdiction of the court by contending that the Judicial Code does not allow jurisdiction on appeal where the validity of an ordinance is involved. This theory is definitely rejected in *John P. King Mfg. Co.* v. *City Council of Augusta*, 277 U. S. 100, 102-114, which appellee says should be overruled by this court. That case was followed in *Hamilton* v. *Regents*, 293 U. S. 245, 257-258; *Lovell* v. *Griffin*, 303 U. S. 444, and no sound reason is advanced why the established rule should be changed.

Although this Court notified counsel (63 S. Ct. 324) to discuss in their briefs the question as to whether the judgment is subject to further *full review* in the courts of Texas, it is noticed that appellee fails to enlighten the court on the subject in its brief. Appellant has done her best to find and present all Texas cases on the subject so that the court can reach a proper conclusion in the interest of justice.

CONCLUSION

The court has jurisdiction and the judgment should be reversed.

Respectfully submitted,

TOM S. WILLIAMS
Sulphur Springs, Texas

HAYDEN C. COVINGTON
117 Adams Street
Brooklyn, New York

Attorneys for Appellant